

**UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress**

In re

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
Subscription Services (SDARS III)

Docket No. 16-CRB-0001-SR/PSSR (2018–
2022) (Remand)

**MUSIC CHOICE’S BRIEF
REGARDING PRIVILEGE ISSUES**

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Pursuant to the Judges’ July 29, 2021 Order, eCRB No. 25541 (the “July 29 Order”), Music Choice respectfully submits this brief regarding various issues relating to SoundExchange’s claimed assertions of privilege relating to documents generated in connection with Prager Metis’s 2017 verification of Music Choice’s PSS royalty payments.

INTRODUCTION

In opposing Music Choice’s motion to compel, SoundExchange did not identify or enumerate the documents it withheld. Instead, it claimed that “there simply is no treasure trove of documents.” Dkt. 23906 at 5. It even went so far as to specifically quote Music Choice’s “presumption” that “Mr. Stark and Prager Metis provided SoundExchange with some written report, communications, or other form of analysis of their findings. . .” and represent to the Court with respect to this presumption that “[a]gain, Music Choice is wrong.” *Id.* Three months later, here we are. Having been ordered to first produce a privilege log and then – when that log was found to be insufficient – to produce the documents for in camera review, it turns out that Music Choice was exactly right. SoundExchange has been withholding over twenty-five documents responsive to Music Choice’s document request, including several of the exact documents Music Choice “presumed” existed, namely documents reflecting Mr. Stark’s investigation and evaluation of the BDO audits.

Yet even now, SoundExchange has failed to meet its burden of proving that the withheld documents are privileged. First, SoundExchange claims various of the documents are protected by an “accountant-client” privilege. But it is well and long established – by the Supreme Court and D.C. Circuit – that there is no such privilege under federal or local D.C. law. Courts within the D.C. Circuit go even farther: refusing even in diversity cases to recognize a state accountant-

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client privilege when deciding state law claims from the handful of states that have recognized such a privilege.

SoundExchange's attorney work-product claims do not fare much better. The documents withheld all relate to Prager Metis's 2017 investigation and evaluation of the BDO audits conducted for Music Choice pursuant to the defensive audit provision in the PSS regulations. This investigation and evaluation is the primary subject of Mr. Stark's testimony in this proceeding. As Music Choice demonstrated in its motion to compel, SoundExchange has clearly waived any work-product protection for these documents – to the extent any such protection existed – by placing the subject matter of the documents at issue in the proceeding. But SoundExchange cannot meet its burden of proving the documents are entitled to work-product protection in the first place.

First, under the applicable D.C. Circuit test, the documents are not protected because they were prepared in the ordinary course of business for the purpose of a regulatory audit and not “because of” litigation. To meet this “because of” standard, the primary object of attention driving the creation of the document must have been potential or actual litigation. It is well established that if the document at issue would have been prepared in substantially the same form, irrespective of any potential future litigation, the document cannot meet the “because of” litigation standard. These documents obviously were prepared because of the regulatory audit process, and not because of litigation.

Even if the documents had been created “because of” litigation, they still would not be given opinion work-product protection, because they do not contain or otherwise disclose the litigation strategy or legal analysis of counsel related to litigation. Instead, they merely disclose the accounting analysis of Prager Metis and in some documents SoundExchange's in-house

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counsel's questions and communications with Prager Metis about that accounting analysis. At best these documents would be considered fact work-product. But even if the documents did qualify for fact work-product protection, Music Choice is entitled to production of the documents because it has a substantial need for that discovery. The documents are clearly relevant to SoundExchange's arguments and Mr. Stark's testimony in this remand, and Music Choice has no other way of obtaining the documents.

ARGUMENT

I. Applicable Legal Standards

A. SoundExchange Bears the Burden to Clearly Prove the Documents at Issue Are Privileged

At this point, SoundExchange has had multiple chances to demonstrate that the specific documents it is withholding are privileged, including in its opposition to Music Choice's motion to compel production, but has repeatedly failed to do so. SoundExchange continues to bear the substantial burden of proving that each document – or portions thereof – are protected from discovery by introducing evidence sufficient to establish the claimed privilege is applicable with reasonable certainty. *F.T.C. v. TRW, Inc.*, 628 F.2d 207, 213 (D.C. Cir. 1980); *Banneker Ventures, LLC v. Graham*, 253 F.Supp.3d 64, 69 (D. D.C. 2017). “Where . . . [the Court has] not been provided with sufficient facts to state with reasonable certainty that the privilege applies, this burden is not met.” *F.T.C.*, 628 F.2d at 213. Thus, SoundExchange does not get the “benefit of the doubt” on its privilege claims. Moreover, to meet its burden SoundExchange, as the proponent of the claimed privilege, “must offer more than just conclusory statements, generalized assertions, and unsworn averments of its counsel.” *In re Veiga*, 746 F. Supp. 2d 27, 34 (D.D.C. 2010). This is particularly true in this proceeding, where SoundExchange's prior

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conclusory statements, generalized assertions, and averments of counsel in its privilege log have been found to be serially inaccurate.

B. Federal Law Does Not Recognize an Accountant-Client Privilege

It has long been settled that federal law does not recognize any form of accountant-client privilege. *United States v. Arthur Young & Co.*, 465 U.S. 805, 816-21 (1984) (rejecting claims of accountant work-product type immunity for accountant's work papers or confidentiality-based accountant-client privilege); *Couch v. United States*, 409 U.S. 322, 335 (1973) ("... [W]e note that no confidential accountant-client privilege exists under federal law, and no state created privilege has been recognized in federal cases.").

In *Arthur Young*, a corporation sought to withhold documents its independent certified public accountants had prepared in the course of an audit. *Arthur Young*, 465 U.S. at 809. The district court had found that the documents were relevant to determining the corporation's tax liability and rejected the assertion of accountant-client privilege. *Id.* at 809. On appeal a divided panel of the Second Circuit reversed in part, creating a new form of work-product immunity for certain tax-related work papers created by certified public accountants. *Id.* at 810. The Supreme Court reversed this decision. The Court first held that there could be no special accountant work-product type immunity for work papers prepared by an independent auditor in the course of an audit. *Id.* at 815-16. The Court next held that there was similarly no testimonial accountant-client privilege under federal law. Quoting its earlier precedent in *Couch*, the Court re-iterated that "'no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases.'" In light of *Couch*, the Court of Appeals' effort to foster candid communication between accountant and client by creating a self-styled work-product

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privilege was misplaced, and conflicts with what we see as the clear intent of Congress.” *Id.* at 817 (quoting *Couch*, 409 U.S. at 335).

In categorically rejecting an accountant-client privilege, the Court noted that recognizing such a privilege would be fundamentally at odds with an accountant’s independence. *Id.* at 818 (“To insulate from disclosure a certified public accountant’s interpretations of the client’s financial statements would be to ignore the significance of the accountant’s role as a disinterested analyst charged with public obligations.”); 819 n.15 (“Endowing the workpapers of an independent auditor with a work-product immunity would destroy the appearance of an auditor’s independence by creating the impression that the auditor is an advocate for the client.”).

The D.C. Circuit and its district courts have – as they must – acknowledged this binding Supreme Court precedent and consistently noted that there is no accountant-client privilege under federal law. *See, e.g., In re Sealed Case*, 676 F.2d 793, 806 & n.42 (D.C. Cir. 1982) (citing the Supreme Court’s rejection of any accountant-client privilege in *Couch* to support the proposition that “not all socially worthy interests or relationships receive the benefits of privilege.”); *Sabre Int’l Sec. v. Torres Advanced Enter. Sols., LLC*, 2013 WL 12333062 at *2 (D.D.C. May 1, 2013); *SEC v. R.J. Reynolds Tobacco Holdings, Inc.*, 2004 WL 3168281 at *7 & n.9 (D.D.C. June 29, 2004); *Gatewood v. U.S. Cellular Corp.*, 124 F.R.D. 504, 505 (D.D.C. 1989); *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 117 F.R.D. 292, 293=94 (D.D.C. 1987).

But trial courts within the D.C. Circuit have gone even further, consistently rejecting not only a federal accountant-client privilege, but also rejecting such a privilege under local D.C. law and even with respect to state law claims involving the minority of states that do recognize some form of legislatively-created accountant-client privilege. For example, in *Gatewood*, after noting

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that there is no accountant-client privilege for claims based in federal law, the district court also held that there is no such privilege under D.C. law. *Gatewood*, 124 F.R.D. at 505. Then, although the case involved Pennsylvania state law claims under diversity jurisdiction, the district court held that under the D.C. Circuit’s choice of law interest analysis courts in the District of D.C. will not recognize a state’s accountant-client privilege even when deciding cases under that state’s substantive law. *Id.* at 506 (“[T]he District has an identifiable overriding interest in the application of its law that all facts relevant to a judicial proceeding be disclosed.”). *See also Indep. Petrochemical Corp.*, 117 F.R.D. at 295-96; *Sabre Int’l Sec.*, 2013 WL 12333062 at *3 (“Accordingly, . . . the court applies District of Columbia law, and finds that the documents at issue are not protected by an accountant-client privilege.”).

Given how conclusively the Supreme Court and courts within the D.C. Circuit have rejected any accountant-client privilege – and for how long they have done so – it remains a mystery how SoundExchange could assert this non-existent privilege in good faith.

C. Standard for Work-Product Privilege

The attorney work-product doctrine protects materials prepared by or at the direction of counsel in anticipation of litigation. *Banneker Ventures*, 253 F. Supp. 3d at 69. While the work-product protection is broader than the attorney-client privilege in that it is not restricted solely to confidential communications between an attorney and client, it is narrower in the crucial respect that it “protects *only* work performed in anticipation of litigation or for trial.” *F.T.C. v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 149 (D.C. Cir. 2015) (emphasis added). Moreover, in order to preserve fairness principles necessary to the proper functioning of the adversary system, the doctrine is most fundamentally concerned with protecting litigation work-product that reveals counsel’s thought processes and legal strategies. *Id.* at 148-49. Thus, while

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attorney work-product protection can sometimes extend to work-product prepared by third parties working at the direction of counsel, such an extension only allows a party to withhold discovery of relevant, non-duplicative documents where the third-party work-product itself discloses the thought processes and strategies of counsel, as opposed to that of the third-party non-lawyer. *Id.* at 152.

1. The work-product doctrine protects the thoughts and litigation strategies of counsel, not those solely of non-attorneys.

In *Boehringer Ingelheim*, the D.C. Circuit reversed the district court's application of work-product immunity to various financial analysis documents prepared by accountants at the direction of counsel related to a settlement agreement. *Id.* at 146. The court did so because – after in camera review of the documents – it was clear that the financial analysis documents “[did] not reveal any insight into counsel’s legal impressions or their views of the case.” *Id.* at 152. To the extent counsel’s mental impressions could be discerned from the documents based upon the attorneys’ direction of the accountants, such mental impressions comprised “counsel’s general interest in the financials of the deal” and not any specific litigation strategy or legal analysis. *Id.* Explaining its holding further, the court noted:

Where an attorney’s mental impressions are those that “a layman would have as well as a lawyer in these particular circumstances, and in no way reveal anything worthy of the description ‘legal theory,’” those impressions are not opinion work product. . . . Where it appears that the focus or framework provided by counsel is obvious or non-legal in nature, it is incumbent on the party claiming opinion work product to explain specifically how disclosure would reveal the attorney’s legal impressions and thought processes.

Id. at 153 (internal citations omitted).

Similarly, in *United States v. Deloitte LLP*, 610 F.3d 129 (D.C. Cir. 2010), the D.C. Circuit vacated the district court’s application of work-product immunity to a memorandum

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prepared by an accounting firm in the course of an audit, where the memorandum contained specific analysis of the financial impact of the likely outcome of a looming litigation threat. *Id.* at 133. The court explained that although it was at least theoretically possible for the accountant’s memorandum to fall within the work-product doctrine – given that the document at issue specifically dealt with potential litigation outcomes – the focus must be on whether in fact that memorandum actually discloses the litigation strategies of counsel as opposed to the thoughts and analysis of the accountants: “. . . the question is not who created the document or how they are related to the party asserting work-product protections, but whether the document contains *work product—the thoughts and opinions of counsel developed in anticipation of litigation.*” *Id.* at 136 (emphasis added). The appellate court remanded with instructions to review the memorandum *in camera* to see if any part of the memorandum actually contained counsel’s litigation thoughts and strategies. *Id.* at 139.

2. The work-product doctrine only protects work-product prepared because of litigation and which would not have been created in the absence of litigation.

In the D.C. Circuit, the “‘testing question’ for the work-product privilege. . . is ‘whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.’” *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998). Under this test, “[w]here a document would have been created ‘in substantially the same form’ regardless of the litigation, work product protection is not available.” *Boehringer Ingelheim*, 778 F.3d at 149; *Banneker Ventures*, 253 F. Supp. 3d at 72 (D.D.C. 2017) (it had not been established that the law firm’s investigatory interview memoranda conducted after its retention were done in preparation for litigation and not for some other reason); *Indep. Petrochemical*, 117 F.R.D. at 298 (accounting

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firm documents not protected by work-product doctrine because they “were not prepared to assist [the client] in present, or reasonably anticipated, litigation but rather were prepared to assist [the accounting firm] in the performance of regular accounting work done by such accounting firms.”).

Even where preparation for litigation may have been one of several purposes for creating a document, that document will not be protected from discovery unless it was “produced with litigation as the *primary object* of attention and when the apprehension of litigation was reasonable in the circumstances.” *In re Sealed Case*, 146 F.3d at 884 (quotations omitted) (emphasis added). *See also Janicker v. George Washington Univ.*, 94 F.R.D. 648, 650 (D.D.C. 1982) (“While litigation need not be imminent, the primary motivating purpose behind the creation of a document or investigative report must be to aid in possible future litigation.”). Thus, when a party seeks work-product protection for a multi-purpose document it:

bears a heavier burden ... because the D.C. Circuit has also recognized that ‘the [work-product] privilege has no applicability to documents prepared by lawyers “in the ordinary course of business or for other non-litigation purposes.” . . . It is the proponent of the work-product protection that bears the burden of demonstrating that the prospect of litigation was an independent, legitimate, and genuine purpose for the document’s creation.

United States v. ISS Marine Svcs., Inc., 905 F.Supp.2d 121, 134 (D.D.C. 2012) (internal citations omitted).

3. Even where established, work-product protection is not absolute and must yield when the party seeking discovery has a substantial need for the protected document.

Even when the party seeking to resist discovery can meet its burden under the test above, documents containing work-product must still be produced if the party seeking production has a substantial need for discovery of the documents. In assessing whether the privilege can be

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overcome, a Court must first examine whether the documents sought contain opinion work-product or fact work-product. *United States v. All Assets Held at Bank Julius Baer & Co., Ltd.*, 315 F.R.D. 103, 109 (D.D.C. 2016). The former is more vehemently protected, but the latter may be disclosed upon a showing of need. *Id.*

Opinion work-product is “that which reveals ‘the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.’ Fed. R. Civ. P. 26(b)(3)(B). Everything else is fact work-product.” *Id.* (citations omitted). In instances “[w]hen a factual document selected or requested by counsel exposes the attorney's thought processes and theories, it may be appropriate to treat the document as opinion work product, even though the document on its face contains only facts. . . however. . . heightened protection is triggered only if ‘disclosure creates a real, nonspeculative danger of revealing the lawyer's thoughts.’” *Boehringer Ingelheim*, 778 F.3d at 151–52. And “[w]here a document contains both opinion and fact work product, the court must examine whether the factual matter may be disclosed without revealing the attorney's mental impressions. . . Factual matter in a document only deserves protection as opinion work product when ‘the selection [of the facts] reflects the attorney's focus in a meaningful way.’” *Bank Julius Baer & Co.*, 315 F.R.D. at 109 .

Fact work-product can be obtained in discovery merely by a showing of “adequate reasons” why it should be disclosed. *Id.*, citing *Boehringer Ingelheim*, 778 F.3d at 153, quoting *In re Sealed Case*, 676 F.2d at 809. “Adequate reasons” exist when the party seeking disclosure “has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” *Id.* at 108 (quoting Fed. R. Civ. P. 26(b)(3)(A)(ii)). To show a substantial need, the party seeking disclosure need only prove the documents are relevant and have value beyond the discovery already produced, and explain why

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the proponent of disclosure did not or could not receive the same discovery through another means. It is not necessary for the party seeking discovery to demonstrate that the documents are critical to the case, mere relevance is sufficient. *Boehringer Ingelheim*, 778 F.3d at 155-156 .

II. SoundExchange Has Failed to Meet its Burden to Support its Work-Product Claims

SoundExchange claims that various documents relating to a royalty examination noticed pursuant to the PSS regulations are protected from disclosure by the attorney work-product doctrine.¹ It has repeatedly failed to meet its burden to prove that the specific documents withheld properly fall within that doctrine. First, SoundExchange failed to even describe or enumerate the withheld documents – much less make specific showings to support work-product treatment for those documents – as was required in its opposition to Music Choice’s motion to compel. Then, when the Judges excused that failure and gave SoundExchange the opportunity to produce a privilege log to try to support its claims, that privilege log was deficient. Next, when the Judges gave SoundExchange yet another chance by conducting an *in camera* review of the documents, the documents submitted for review were not only insufficient to clearly establish any privilege but also demonstrated that SoundExchange’s privilege log was riddled with inaccuracies and mischaracterizations. At any point in this chain – including now – the Judges would be well within their authority to deny the privilege claims based on these repeated and egregious failures to establish that any privilege existed in the first place. *See Walker v. Ctr. for Food Safety*, 667 F. Supp. 2d 133, 138 (D.D.C. 2009) (privilege was waived after repeated failures to appropriately log documents). But in any event, the documents in question simply are not work-product, so it is no surprise that SoundExchange has been unable to specifically prove a

¹ SoundExchange claims certain documents are also protected by an “accountant-client” privilege. As demonstrated *supra*, at 4-6, it is well established that there is no such privilege under applicable federal law.

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reasonable certainty that attorney work-product immunity applies. *TRW, Inc.*, 628 F.2d at 213; *Banneker Ventures*, 253 F.Supp.3d at 69.

A. These Documents Were Not Created In Anticipation of Litigation

The work-product doctrine applies only to documents created because of reasonably anticipated litigation. *Jud. Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 926 F. Supp. 2d 121, 137–38 (D.D.C. 2013) (quotations omitted); *Banneker Ventures*, 253 F. Supp. 3d at 69. Under the D.C. Circuit’s “because of” test, a document was not created because of reasonably anticipated litigation – even where the documents has some relation to potential litigation – if it would have been created in substantially the same form irrespective of any future litigation. *Boehringer Ingelheim*, 778 F.3d at 150; *Banneker Ventures*, 253 F. Supp. 3d at 72. *See also supra* at 8-9. Applying this standard, SoundExchange’s claim of work-product immunity clearly fails. The disputed documents relating to Prager Metis’s evaluation of the BDO audits were created in the ordinary course of a royalty payment audit pursuant to the PSS regulations – not because of any specific anticipation of litigation. As the Judges noted in the July 29 Order, “auditing by SoundExchange and/or the licensee is permitted pursuant to the Judges’ rules, in the ordinary course of this regulated business, *absent any anticipation of litigation.*” July 29 Order at 4 (citing 37 C.F.R. § 382.7).

The documents withheld by SoundExchange were created during – and as part of – a PSS royalty audit noticed by SoundExchange pursuant to the applicable regulations. When Music Choice invoked the defensive audit process under those regulations, SoundExchange and Prager Metis were allowed to investigate, evaluate, and verify the audits done for Music Choice by its independent auditors, BDO. This investigation was also pursuant to the PSS regulations. 37 C.F.R. § 382.7(d) (requiring that licensee provide audit reports and underlying paperwork to

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SoundExchange). Under these facts, it is clear that Prager Metis conducted its verification in the ordinary course of business and Prager Metis's verification would have occurred – and the various withheld documents would have been created – irrespective of any hypothetical potential for future litigation. SoundExchange cannot credibly establish otherwise. *Banneker Ventures*, 253 F. Supp. 3d at 72 (it had not been established that the law firm's investigatory interview memoranda conducted after its retention were done in preparation for litigation and not for some other reason).

In noticing and conducting the royalty audit, SoundExchange and Prager Metis consistently represented to Music Choice that Mr. Stark's investigation was being conducted pursuant to the royalty audit provision set forth in the statutory license. Litigation was never mentioned. To the contrary, Mr. Stark expressly represented that he was accessing Music Choice's records only for the purpose of royalty verification pursuant to the regulations. *See* Decl. of Margaret Wheeler-Frothingham, ¶ 2 and Exhibit A (the 2017 nondisclosure agreement between Music Choice and Mr. Stark's prior firm, Eisner Amper, noting that [REDACTED]

[REDACTED]
[REDACTED]).

Similarly, the engagement letter SoundExchange entered into with Mr. Stark surrounding that process also shows that the "audit" was specifically *not* intended to be conducted in a litigation posture. *See* Decl. of Margaret Wheeler-Frothingham, ¶ 3 and Exhibit B, (2017 engagement letter between Mr. Stark and SoundExchange regarding the verification of Music Choice's royalty payments, [REDACTED]
[REDACTED]). Simply put, Prager Metis's evaluation of the BDO royalty payment audits was done as part of the ordinary course of the

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regulatory audit process. Thus any documents reflecting or relating to that evaluation would have been created in substantially the same form irrespective of the hypothetical potential for later litigation.

Nor is there any reason to think that SoundExchange reasonably believed, at the time of the documents' creation, that litigation would arise from the verification of Music Choice's PSS payments. This is independently fatal to any claim of work-product immunity because under the "because of" test for work-product, "[f]or a document to meet this standard, the lawyer must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable.'" *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 133–34 (D.D.C. 2012) (quoting *In re Sealed Case*, 146 F.3d at 884).

There can have been no such objectively reasonable belief that litigation was a concrete consideration at the time these documents were created: SoundExchange has conducted dozens of such audits over the 20 years of its existence. But Music Choice is only aware of one instance in which SoundExchange had ever filed a lawsuit stemming from its audits of statutory licensees at the time the documents at issue were created. *See Complaint, SoundExchange, Inc. v. SiriusXM Radio Inc.*, No. 1:13-cv-01290, Dkt. No. 1, (D.D.C Aug. 26, 2013).² Moreover, in the only previous audit of Music Choice, the parties settled any disputes arising from the audit by voluntary agreement. Music Choice Opening Br. at 31. The mere attenuated, hypothetical possibility that is inherent in *all* audits and other similar investigations that some future litigation *might* occur cannot be sufficient to satisfy the "because of" test for determining work-product protection:

² In its Opening Brief, SoundExchange claims that another royalty audit led to litigation with Muzak. SoundExchange Opening Br. at 22. This claim is false. That litigation was not based upon any royalty audit. Rather, Muzak had proactively informed SoundExchange in the ordinary course of business that it had acquired the DMX service and would begin paying royalties for that service under the lower PSS rates. This notice is what precipitated the litigation. *SoundExchange v. Muzak LLC*, 167 F.Supp.3d 147, 149 (D.D.C. 2016).

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To argue that every audit is potentially the subject of litigation is to go too far. While abstractly true, the mere possibility is hardly tangible enough to support so broad a claim of privilege.

ISS Marine Svcs., 905 F.Supp.2d at 137 (D.D.C. 2012) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980)).

Moreover, even if there were some remote possibility of litigation arising from Prager Metis's verification and evaluation of the BDO audits, such remote and hypothetical possibility was clearly not the primary purpose or motivating factor behind the creation of the withheld documents. The regulatory audit process, in the ordinary course of business, was the primary object of and motivating factor for the creation of those documents. *In re Sealed Case*, 146 F.3d at 884; *Janicker*, 94 F.R.D. at 650.

Nor is this a situation where Mr. Stark or Prager Metis specifically undertook, in the course of a financial audit, to evaluate the economic impact of a specific anticipated future litigation – the reason the D.C. Circuit recognized as possibly giving rise to the presence of attorney work-product in an auditor's memorandum. *See Deloitte*, 610 F.3d at 133; *id.* at 143 (citing *Arthur Young*, 465 U.S. at 818 and distinguishing the context in which a party attempts to obtain discovery of “not an independent auditor's ‘interpretations of the client's financial statements,’ which Arthur Young would permit, but an attorney's thoughts and opinions developed in anticipation of litigation, which the work-product doctrine forbids.”). In this proceeding, it is precisely Mr. Stark's analysis of the BDO audits that is at issue – not attorney strategy about any specific actual or anticipated litigation.

B. The Documents Withheld By SoundExchange Do Not Contain Counsel's Mental Impressions or Legal Strategy Regarding Litigation

Even if SoundExchange's legitimate anticipation of litigation had been the primary object or motivating factor for the creation of the withheld documents, based upon the Judges'

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description of the documents after their *in camera* review those documents neither contain nor reveal counsel's thought process or legal strategy directly related to any litigation such that they are entitled to be shielded from disclosure under the circumstances of this case.

As established *supra*, at 9-10, even within the work-product doctrine, different types of work-product enjoy different levels of protection – and for some types of work-product, that protection is easily overcome. Opinion work-product – *i.e.*, that which “reveals ‘the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation’” is treated differently from fact product, *i.e.*, every other kind of work-product. *Bank Julius Baer*, 315 F.R.D. at 109 (citations omitted). To the extent the document under review contains work-product but does not reveal an attorney's insight, legal analysis or strategy with respect to a litigation – and even where such thought processes are revealed but are of an obvious nature that does not warrant protection – the documents will be treated as fact work-product and subject to disclosure upon a showing of substantial need. *Boehringer Ingelheim*, 778 F.3d at 152-53.

“Rule 26(b)(3) allows a court to order disclosure when the requesting party can show a ‘substantial need’ for the material and an inability to procure equivalent information ‘without undue hardship.’ . . . When a court orders disclosure under this exception, however, it must still ‘protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.’” *Deloitte*, 610 F.3d at 135, citing Fed. R. Civ. P. 26(b)(3)(A)(ii) and Fed. R. Civ. P. 26(b)(3)(B).

When documents contain only financial analysis requested or supervised by counsel but produced by non-lawyers, those documents often do not reveal any insight into counsel's legal impressions or strategies related to litigation. *See Bohringer Ingelheim*, 778 F.3d at 152

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(rejecting treatment of accountant’s financial analysis as opinion work-product where “the documents requested by the FTC are ‘the sort of financial analyses one would expect a company exercising due diligence to prepare when contemplating settlement options.’ . . . There is no ‘real, non-speculative danger of revealing the lawyer’s thoughts’ when the thoughts are already well-known.”); *Deloitte*, 610 F.3d at 139 (even where memorandum prepared by accounting firm during course of an audit included analysis of potential economic impact of future litigation and description of meeting with counsel on that subject, memorandum was likely to contain thoughts and analyses “by non-attorneys which may not be so intertwined with the legal analysis as to warrant protection under the work-product doctrine.”).

And even though, in some rare cases, where “a factual document selected or requested by counsel exposes the attorney’s thought processes and theories, it may be appropriate to treat the document as opinion work product, even though the document on its face contains only facts. . . . Opinion work product protection is warranted *only if* the selection or request reflects the attorney’s focus *in a meaningful way*. . . . heightened protection is triggered only if ‘disclosure creates a real, nonspeculative danger of revealing the lawyer’s thoughts.’” *Boehringer Ingelheim*, 778 F.3d at 151–52 (emphasis added). For such a finding, there must be some indication that the lawyer “sharply focused or weeded the materials.” *Id.* (quoting *In re Sealed Case*, 124 F.3d at 236-37 .

There is no indication that any of the documents at issue discuss or reveal attorney mental impressions, conclusions, opinions, or legal theories regarding any potential future litigation. Nor is there anything that would lead Music Choice to believe – from the limited information in SoundExchange’s privilege log and the descriptions in the July 29 Order – that any attorney “focused” or “weeded” the materials in question at all, much less did so “sharply.” Certainly,

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there is no indication that any of Prager Metis's or Lewis Stark's analysis is "so intertwined with the legal analysis as to warrant protection under the work-product doctrine." *Deloitte* , 610 F.3d at 139 .

C. Music Choice Has Substantial Need for These Documents

Given that none of the documents at issue contain opinion work-product, Music Choice is entitled to discovery of those documents if it can show a substantial need for them. To demonstrate substantial need, Music Choice merely must establish that the documents are relevant, non-duplicative of discovery already obtained, and that Music Choice is not at fault for failing to obtain the documents from another source. *Boehringer Ingelheim*, 778 F.3d at 155-156 . Under the D.C. Circuit's standard there is clearly a substantial need for Music Choice to obtain the documents in dispute. Given that SoundExchange has proffered Stark's testimony about the very examination memorialized by the documents in dispute, these documents are not only relevant; they are *necessary* to test the accuracy and truthfulness of Stark's testimony and SoundExchange's claims in this proceeding. *See Byrd v. Reno*, 1998 WL 429767, at *1 (D.D.C. Mar. 18, 1998) (Defendant had an "obvious and substantial need" for recorded conversations claimed by plaintiff to be work-product because plaintiff intended to offer such conversations as evidence). This is particularly so because after conducting a full investigation, neither Prager Metis nor SoundExchange identified a single deficiency in BDO's audits – but they are now claiming Mr. Stark actually found deficiencies during that investigation. *See United States v. Clemens*, 793 F. Supp. 2d 236, 258 (D.D.C. 2011) (substantial need shown for production of law firm witness interview notes directly pertaining to defendant and which showed inconsistencies in the witnesses' testimony about the defendant.)

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Music Choice bears no blame in failing to obtain these documents from other sources. Presumably, the only parties with copies of these documents are SoundExchange and Prager Metis. Music Choice previously asked the Judges to include documents like these very documents in the subpoena issued to Prager Metis. *See* Music Choice's Opposition to SoundExchange's Motion for Issuance of Subpoena, eCRB No. 23902. But the Judges denied that request – leaving Music Choice no avenue to obtain that information other than through discovery from SoundExchange. *See* Order Granting SoundExchange's Motion for Subpoena, eCRB No. 25286 at 4. So Music Choice has no other way of obtaining this information, which is crucial to testing allegations advanced in SoundExchange's briefing. These circumstances clearly satisfy the requirements for showing the substantial need for work-product.

Notably, even expert witnesses – who enjoy unique work-product protection under federal law – cannot claim work-product protection for documents they relied upon in generating their testimony. *See* Fed. R. Civ. P. 26(b)(4)(C)(ii)-(iii) (Rule 26 does not shield from discovery expert-attorney communications that identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed). And witnesses in proceedings before the Judges have consistently been required to produce any documents they relied upon in drafting their written testimony. There can be no serious question that Mr. Stark relied upon many of these documents – and particularly any memoranda, notes, or correspondence contemporaneous with his 2017 investigation of the BDO audits – when drafting his testimony in this proceeding. He could not reasonably have drafted his testimony merely from memory, especially when he had these documents at his disposal. Those documents clearly must be produced.

D. Application of the Law to the Specific Documents Withheld By SoundExchange and Not Yet Resolved By the Judges

1. Item 1: 3rd March 28, 2017 email (July 29 Order, p. 3)

Although this e-mail is between in-house SoundExchange counsel, the content of the communication apparently relates to communications between SoundExchange and Prager Metis related to Prager Metis's evaluation of the BDO audits. As demonstrated above, such communications were not conducted in anticipation of litigation, but rather were conducted in the ordinary course of business as part of the regulatory audit process and would have been conducted in the absence of any hypothetical future litigation. Moreover, the document does not appear to contain any attorney's mental impressions or legal strategy related to litigation. And in light of Mr. Stark's testimony in this proceeding the correspondence is relevant to Music Choice's rebuttal of that testimony and Music Choice has no other way to obtain this discovery.

2. Item 1: 4th March 28, 2017 email (July 29 Order, p. 3)

It is impossible for Music Choice to understand the nature of this communication based solely upon the Judges' description in the July 29 Order. That said, assuming the communication contains the mental impressions of counsel, the document would still not be shielded from production unless those impressions of counsel relate specifically to concrete litigation issues, as opposed to merely issues relating to an audit.

3. Item 4: November 8, 2017 emails between Mr. Prendegast and Ms. Mazarakis (July 29 Order, p. 5)

These emails apparently comprise communications between SoundExchange and Prager Metis related to Prager Metis's evaluation of the BDO audits. As demonstrated above, such communications were not conducted in anticipation of litigation, but rather were conducted in the ordinary course of business as part of the regulatory audit process and would have been

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conducted in the absence of any hypothetical future litigation. Moreover, the document does not appear to contain any attorney's mental impressions or legal strategy related to litigation. And in light of Mr. Stark's testimony in this proceeding the correspondence is relevant to Music Choice's rebuttal of that testimony and Music Choice has no other way to obtain this discovery.

4. Item 5: October 13, 2017 emails from Ms. Mazarakis to Mssrs. Predegrast, Stark, and Gibson (July 29 Order, pp. 5-6)

These emails apparently comprise communications between Prager Metis and SoundExchange related to Prager Metis's evaluation of the BDO audits. As demonstrated above, such communications were not conducted in anticipation of litigation, but rather were conducted in the ordinary course of business as part of the regulatory audit process and would have been conducted in the absence of any hypothetical future litigation. Moreover, the document does not appear to contain any attorney's mental impressions or legal strategy related to litigation. And in light of Mr. Stark's testimony in this proceeding the correspondence is relevant to Music Choice's rebuttal of that testimony and Music Choice has no other way to obtain this discovery.

5. Item 6: Attachment (July 29 Order, p. 6)

The attachment appears to be a document containing Prager Metis's evaluation of the BDO audits, shared with SoundExchange. As demonstrated above, such a document was not created in anticipation of litigation, but rather was created in the ordinary course of business as part of the regulatory audit process and would have been created in the absence of any hypothetical future litigation. Moreover, the document does not appear to contain any attorney's mental impressions or legal strategy related to litigation. And in light of Mr. Stark's testimony in this proceeding the correspondence is relevant to Music Choice's rebuttal of that testimony and Music Choice has no other way to obtain this discovery.

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6. Item 7: Memorandum (July 29 Order, p. 7)

The document appears to be a memorandum created by Prager Metis regarding its evaluation of the BDO audits. As demonstrated above, such a document was not created in anticipation of litigation, but rather was created in the ordinary course of business as part of the regulatory audit process and would have been created in the absence of any hypothetical future litigation. Moreover, the document does not appear to contain any attorney's mental impressions or legal strategy related to litigation. And in light of Mr. Stark's testimony in this proceeding the correspondence is relevant to Music Choice's rebuttal of that testimony and Music Choice has no other way to obtain this discovery.

7. Item 8: 2nd Paragraph of February 23, 2018 email and next email in chain (July 29 Order, p. 8)

The second paragraph of the first email from Ms. Jackson to Ms. Mazarakis and Mr. Stark appears to discuss Prager Metis's evaluation of the BDO audits. As demonstrated above, such communications were not conducted in anticipation of litigation, but rather were conducted in the ordinary course of business as part of the regulatory audit process and would have been conducted in the absence of any hypothetical future litigation. Moreover, the document does not appear to contain any attorney's mental impressions or legal strategy related to litigation. And in light of Mr. Stark's testimony in this proceeding the correspondence is relevant to Music Choice's rebuttal of that testimony and Music Choice has no other way to obtain this discovery.

With respect to the next emails in the chain, dated February 6, 2018, between Ms. Jackson and Ms. Mazarakis, these emails merely discuss a particular auditing procedure. As demonstrated above, such communications were not conducted in anticipation of litigation, but rather were conducted in the ordinary course of business as part of the regulatory audit process and would have been conducted in the absence of any hypothetical future litigation. Moreover,

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the document does not appear to contain any attorney's mental impressions or legal strategy related to litigation. And in light of Mr. Stark's testimony in this proceeding the correspondence is relevant to Music Choice's rebuttal of that testimony and Music Choice has no other way to obtain this discovery.

8. Item 9: October 13, 2017 email (July 29 Order, pp. 8-9)

This email, from Mr. Stark to Ms. Jackson, Mr. Predegrast, and Ms. Burrell, appears to contain Mr. Stark's evaluation of the BDO audits and other discussion related to his investigation. As demonstrated above, such communications were not conducted in anticipation of litigation, but rather were conducted in the ordinary course of business as part of the regulatory audit process and would have been conducted in the absence of any hypothetical future litigation. Moreover, the document does not appear to contain any attorney's mental impressions or legal strategy related to litigation. And in light of Mr. Stark's testimony in this proceeding the correspondence is relevant to Music Choice's rebuttal of that testimony and Music Choice has no other way to obtain this discovery.

9. Item 10: Audit Program Report (July 29 Order pp. 9-10)

This document apparently comprises an internal SoundExchange business record, reflecting the status and relevant information concerning all pending regulatory audits being conducted by SoundExchange, which specifically contains information related to Prager Metis's evaluation of the BDO audits. As demonstrated above, documents related to SoundExchange's auditing activities reflect SoundExchange's ordinary course of business and – unless certain entries clearly discuss litigation prospects – were not created in anticipation of litigation, but rather were created in the ordinary course of business as part of the regulatory audit process and would have been created in the absence of any hypothetical future litigation. Moreover, the

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document does not appear to contain any attorney's mental impressions or legal strategy related to litigation. And in light of Mr. Stark's testimony in this proceeding the correspondence is relevant to Music Choice's rebuttal of that testimony and Music Choice has no other way to obtain this discovery.

Moreover, to the extent various confidential information related to other licensees is also contained in the document, this does not shield the document from production, or even render redactions appropriate. In any given rate proceeding before the Judges, thousands of documents containing such confidential information are produced. This includes many documents subject to the confidentiality provision in 37 C.F.R. §370.3(g), which is meant to preclude SoundExchange from misusing its access to licensee confidential information for its own purpose or copyright owners' purposes. It does not in any way limit discovery in matters before the Judges. Such production may be made under an outside counsel eyes only restriction, pursuant to the operative protective order. There is no reason to treat this document any differently than the thousands of other documents with similar confidential information that have been produced in this and other proceedings.

There could be numerous reasons why information regarding other audits would be relevant to his remand proceeding. For example, they could be used to rebut SoundExchange's claims about the extent and prevalence of massive licensee underpayments, or could bolster Music Choice's claims about the oppressive and unreasonable conduct of SoundExchange and its forensic accountants and their abuse of the audit process. In any event, and especially given the Judges' repeated findings of various misrepresentation in SoundExchange's privilege log, SoundExchange should not get to decide what to redact if this document contains any relevant information. Nor should Music Choice be required to demonstrate the relevance of each portion

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of a document it has not been able to see. The document should simply be produced on a restricted basis.

10. Item 12: October 23, 2017 email (July 29 Order pp. 9-10)

It is not clear from the Judges' description of this email, from Mr. Prendegast to Mr. Rushing, what exactly is discussed, but the Judges indicate that the content broadly relates to SoundExchange's audit of Music Choice's royalty payments. As demonstrated above, such communications were not conducted in anticipation of litigation, but rather were conducted in the ordinary course of business as part of the regulatory audit process and would have been conducted in the absence of any hypothetical future litigation. Moreover, the document does not appear to contain any attorney's mental impressions or legal strategy related to litigation. And in light of Mr. Stark's testimony in this proceeding the correspondence is relevant to Music Choice's rebuttal of that testimony and Music Choice has no other way to obtain this discovery.

III. The Judges Should Not Create Precedent for Allowing Opposing Counsel to Review Documents Subject to Unresolved Privilege Claims

The current posture of SoundExchange's privilege claims puts Music Choice at a severe disadvantage in this brief because it must argue against privilege claims specific to documents it has not seen. This problem is aggravated by SoundExchange's serial misrepresentation of the documents in its privilege log. In recognition of this problem, the Judges kindly asked Music Choice to brief whether its counsel should be permitted to review the disputed withheld documents on an "Attorneys' Eyes Only" basis. *See* July 29 Order at 11. Although it would certainly make Music Choice's opposition to the privilege claims easier, Music Choice respectfully suggests that the Judges not provide its counsel with access to the documents.

Although in this case SoundExchange's privilege claims are obviously without merit, Music Choice is concerned with setting a procedural precedent that might be followed in future

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cases where there might be some legitimate colorable claim of privilege. In such a case, the unique nature of these rate proceedings renders outside counsel access to privileged documents potentially harmful, even pursuant to a protective order. For example, in this proceeding counsel of record for both Music Choice and SoundExchange represent those same parties both in Copyright Royalty Board rate proceedings and in audits conducted under the PSS regulations. Once counsel saw these materials, they could not un-see them – even if those materials were later determined to be legitimately privileged. And it would be nearly impossible for counsel – no matter how professional or ethical – to not in some way utilize information gleaned from those documents in providing subsequent counseling on future audits and audit-related disputes. Moreover, it is difficult to see how the very act of providing opposing counsel with access to a privileged document would not – in itself – risk destroying the privilege.

But given that the inability to view the documents at issue inherently puts Music Choice at a significant disadvantage in this briefing, and in light of the fact that the Judges have now given SoundExchange numerous chances to support their privilege claims – and SoundExchange has failed time and time again – the Judges should not continue to give SoundExchange the benefit of the doubt or apply any presumptions of privilege. SoundExchange has had the burden of establishing privilege from the moment it opposed Music Choice’s motion to compel. Yet after multiple opportunities it has not conclusively established any privilege. If the Judges cannot conclusively find sufficient facts to clearly support work-product protection for the withheld documents on the existing record, Music Choice respectfully requests that the Judges finally grant its motion to compel. *TRW, Inc.*, 628 F.2d at 213 .

CONCLUSION

SoundExchange seeks to hide documents that were created in the course of a routine audit entirely divorced from any litigation posture, and which therefore do not disclose any attorney's mental impressions or legal strategy with respect to litigation. The work-product doctrine cannot apply to these documents. But even if it were arguably applicable, the documents at issue comprise at most fact work-product, as there is no reason to think that they reveal any litigation strategy of counsel. Moreover, SoundExchange has made these documents highly relevant – they pertain to SoundExchange's own central allegations in this remand, and to the testimony of SoundExchange's only witness on that issue. And because Music Choice has no other means by which to obtain these documents, there is a clear and substantial need that overrides any protection to which the documents might be entitled. As for SoundExchange's claim of accountant client privilege, there simply is no such thing. The Judges should finally compel SoundExchange to produce the remaining disputed documents.

Dated: August 12, 2021

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Thursday, August 12, 2021, I provided a true and correct copy of the Music Choice's Brief Regarding Privilege Issues to the following:

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